Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-718

MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Margaret Townsend, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 30, 1977.

Opinions Below

The opinion of the district court, which is not reported, is set out in the appendix, pp. 1a-18a. The order of the court of appeals vacating the district court judgment and remanding for reconsideration, which is not reported, is set out in the appendix, pp. 19a-20a. The judgment of the district court confirming its original judgment, which is not reported, is set out in the appendix, pp. 21a-22a. The

opinion of the court of appeals, which is reported at 558 F.2d 117, is set out in the appendix, pp. 23a-34a. The order of the court of appeals denying rehearing, which is not yet reported, is set out in the appendix, pp. 35a-36a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 30, 1977. A timely petition for rehearing was denied on August 24, 1977 and this petition for Certiorari was filed within ninety days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Was the June 30, 1977, decision of the Court of Appeals, holding that evidence that a job requirement excluded 94% of the black adult population was irrelevant to Title VII, clearly erroneous and in conflict with the decision of this Court on June 27, 1977, upholding such evidence as sufficient to demonstrate discriminatory effect under Title VII, *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 27, 1977)?

2. Did the respondents act arbitrarily and capriciously, in violation of due process of law, or contrary to equal protection of the law when they dismissed petitioner from a job which she had concededly performed with complete competence for 8 years solely because she could not meet a newly implemented requirement that any person holding her job must have a Bachelor of Science degree?

Statutory Provision Involved

Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2) as amended, provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Statement of the Case

Petitioner is a 44-year old black woman who was fired by respondents[1] after eight years of exemplary job performance because she did not possess a college degree, an eligibility requirement imposed some years after she began

[1] The respondents are Nassau County Medical Center; Doctor Donald H. Eisenberg, Superintendent; Nassau County Civil Service Commission; Gabrial Kahn, Chairman; Edward Witanowski, Edward A. Simmons, Adele Leonard, Executive Director of Nassau County Civil Service Commission. Petitioner's claim against the state defendants was dismissed before trial.

her employment. Petitioner commenced this suit alleging that respondents had discriminated against her on the basis of race in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended. Petitioner claimed, and the United States District Court found, that the requirement of formal college education had an unjustifiable racially disproportionate impact forbidden by Title VII. The Court of Appeals for the Second Circuit reversed the district court judgment on the grounds that petitioner failed to make out a *prima facie* case, notwithstanding unchallenged statistical proof that three times fewer blacks than whites in the area population could satisfy the challenged requirement. Such a holding is so directly in conflict with this Court's recent decision in *Dothard* v. *Rawlinson,* 97 S. Ct. 2720 (June 30, 1977), decided just three days before the court of appeals rendered its decision here, that summary reversal, or remand for reconsideration in light of *Dothard,* is warranted.[2]

Petitioner has been employed in the blood bank of Nassau County Medical Center since 1965. Her competence to perform the duties of Medical Technologist I is unquestioned: she is rated among the top employees in the blood bank and from 1967 served as assistant to the Supervisor. In 1970, she was appointed Acting Supervisor of the entire laboratory and served in that capacity for six months. Thereafter, petitioner trained and then served as assistant to the newly-appointed permanent supervisor until 1973,

[2] Petitioner promptly brought *Dothard* to the attention of the court of appeals in a timely petition for rehearing, but the petition was denied without comment.

when she was fired for want of formal education.[3] Before she was fired, petitioner trained new employees in the blood bank to perform the duties of a Medical Technologist I. These new employees, all of whom are white, now earn more than petitioner because they have had the required formal education.

Petitioner was officially given the title and pay of a Medical Technologist I in 1967 as a result of a Civil Service reclassification. As a result of the same reclassification, respondents imposed the requirement that all candidates for permanent appointment as Medical Technologists I possess a college degree or equivalent academic certification,[4] and that they take and pass the Civil Service Examination.[5]

[3] The record reveals that petitioner received an inferior education in segregated Florida and South Carolina Schools. See *Brown* v. *Board of Education,* 349 U.S. 294 (1954); *Gaston Co.* v. *U.S.,* 395 U.S. 289 (1969). "Her high school was apparently so poor that it was abandoned when integration was required . . ." p. 2a.

[4] Certification by the American Society for Clinical Pathologists (ASCP), is an alternative prerequisite. To obtain such certification, however, one must have a specified amount of laboratory training *and* have a college degree. Petitioner, although not a member of ASCP, trained students who would later get ASCP certification and permanent Medical Technologist I positions. Petitioner is certified by the International Association of Laboratory Technologists as a Registered Medical Technologist (RMT).

[5] An issue not presented in this case is respondents' use of a written examination, in addition to the college degree requirement, for qualification as a permanent Medical Technologist I. The examination tested not only knowledge of blood banking techniques relevant to the job at issue, but skills used in ten other laboratories involving very different methods and lab equipment: hematology, histology, virology, chemistry, serology, bacteriology, immunohemotology, electrophoresis, microbiology, and parisitology. This Court has already held "a test may be used in jobs other than those for which it has been professionally validated only if there are 'no significant differences' between the studied and unstudied

An examination for permanent classification was given in April, 1973, but respondents denied petitioner permission to take the examination because she did not fulfill the formal academic requirements. In December, 1973, petitioner was fired as a result of the promulgation of a Medical Technologist I eligibles list based on the April, 1973 examination. Three months later she was rehired, and given the same duties, but at a lower-paying Laboratory Technician II classification. Before she was fired, petitioner was the *only* black Medical Technologist I in the blood bank, which has approximately fifteen workers; at the time of trial, there were *no* black Medical Technologists I.[6]

Guided by the approach in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the district court, using local and state census statistics introduced by petitioner, found that the college requirement operated to exclude blacks from employment at a rate three times greater than whites, and held that petitioner had made out a *prima facie* case under Title VII. The district court also concluded respondents produced no evidence that the challenged degree require-

jobs." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 432 (1975). Pursuant to a "grandfather" provision, petitioner was able to take the examination only once. She did not pass, but was continued for two more years. If she had had a college degree, she would be permitted to take the examination repeatedly without being either fired or demoted. Thus, it is the degree which bars petitioner's path. Inasmuch as petitioner was not fired because she has not passed the examination, its validity, while not conceded, is not yet ripe for determination.

[6] The only other black in the blood bank is Frank Appelwaithe, a male with not one but two college degrees. Mr. Appelwaithe was hired as permanent supervisor in 1970 to fill the vacancy left by George Davis, a white who had no college degree. Mr. Appelwaithe is a Medical Technologist III.

ment was related in any way to petitioner's ability to perform the job.[7]

The district court found that in denying petitioner permission to take the 1973 examination because she was not "properly" educated,[8] and thereafter demoting her to a lower paying position, respondents violated Title VII; the court ordered petitioner reinstated as a provisional Medical Technologist I, enjoined respondents from disqualifying petitioner from taking future civil service examinations because she does not have a college degree, and awarded back pay and attorneys fees.

On June 30, 1977,[9] the court of appeals reversed the judgment with directions to dismiss the complaint on the

[7] Nor can respondents now argue that the degree requirement is job related. In a memorandum to respondent Medical Center dated August 8, 1977, respondent Civil Service Commission obstensibly abolished the college degree requirement in recognition of the "criticism that the Bachelor's Degree in Science did not provide adequate nor [sic] appropriate laboratory training." In reality, however, since ASCP certification is still required and is currently granted only to individuals with college degrees, the degree requirement remains in effect. See note 4, *supra*.

[8] On-the-job training rather than formal education is what is essential to successful work in the blood bank. One witness, who had a college degree and ASCP certification, testified that she learned everything she knew about blood banking from petitioner. Although the Medical Technologist I title is used throughout the Medical Center, the evidence established that once a person is trained in a particular laboratory, he is not thereafter transferred. Job specifications for Medical Technologist I do not require experience, while those for Medical Technologist II require two years experience *in the field of specialization*, indicating that vertical rather than horizontal movement within the Medical Center is what is contemplated.

[9] Upon respondents' initial appeal, the Second Circuit, on June 21, 1976, vacated the district court judgment for the plaintiff and remanded for reconsideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976). On remand, the district court confirmed its original judgment, and respondents again appealed.

ground that petitioner failed to establish a *prima facie* case. The court of appeals held that evidence demonstrating that the college degree requirement excluded almost three times as many blacks as whites in the adult population, was not sufficient to establish adverse racial impact. Petitioner filed a motion for rehearing in light of *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 27, 1977). The petition was denied without opinion.

Reasons for Granting the Writ

The court of appeals held that unrebutted census statistics showing that a job requirement disqualifies a disproportionate number of minorities in the adult population are insufficient to establish a *prima facie* case of discriminatory impact under Title VII. The Second Circuit ruled, at the urging of respondents,[10] that plaintiff had failed to make out a *prima facie* case because "statistical evidence concerning only the general population is [not] sufficient to demonstrate that a job prerequisite 'operates to exclude' minorities." p. 29a. This is precisely the argument rejected by this Court in *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 30, 1977).

> The appellants argue that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a *prima facie* case. . . . There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants.

97 S. Ct. at 2727. In *Dothard*, this Court upheld the use of census data to prove the discriminatory impact of the defendant's height-weight job requirement. 97 S. Ct. at 2727, n. 12. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430, n. 6 (1971), this Court expressly relied on census data showing the disproportionate impact of Duke Power's high school degree requirement on adults in North Carolina. Because *Dothard* was decided only three days before the panel decision in the instant case, however, the court of appeals could not as a practical matter have been aware of it when its decision was written. Under these circumstances, it would clearly be appropriate to summarily reverse the decision below or to vacate and remand for reconsideration in light of *Dothard*.

The decision of the Second Circuit holding irrelevant evidence that a job requirement precludes a disproportionate segment of the black adult population is squarely in conflict with the decisions of the three other circuits. See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 918 (5th Cir. 1973); *Johnson* v. *Goodyear Tire and Rubber*, 491 F. 2d 1364, 1371 (5th Cir. 1974); *Green* v. *Missouri Pacific Railroad Co.*, 523 F. 2d 1290, 1293-95, *rehearing den.* 523 F. 2d 1299 (8th Cir. 1975); *Boyd* v. *Ozark Airlines, Inc.*, 15 EPD ¶ 7863, pp. 6283, 6285, n. 1 (8th Cir. 1977); *Gregory* v. *Litton Systems*, 472 F. 2d 631 (9th Cir. 1972), aff'g 316 F. Supp. 401, 403 (C.D. Cal. 1970). In addition, the Equal Employment Opportunity Commission, conforming to this Court's decision in *Griggs*, has consistently held that the disparate impact of a job re-

[10] See, e.g., Brief for Nassau County Defendants-Appellants, No. 76-7522, pp. 6-7.

quirement can be measured by its effect on the general population.[11] Thus either the Commission will have to follow a different substantive rule in the Second Circuit than it applies in the rest of the country or its probable cause findings in cases arising in New York, Vermont and Connecticut will often be in direct conflict with federal law in that circuit.

The Second Circuit appears to have ruled that a job requirement has a discriminatory effect only if "virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant." p. 29a, n. 6. If the Second Circuit's standard considers only evidence of the qualifying rate among actual job applicants, it is precisely the standard rejected by *Dothard*. It is also impossible to understand how this standard could result in judgment for defendant in this case, since *no* black applicant for the position petitioner held, Medical Technologist I at the blood bank, has ever satisfied the degree re-

[11] E.E.O.C. Opinions Nos. 77-9, 2 CCH Emp. Practices Guide ¶ 6564; 75-199, 2 CCH Emp. Practices Guide ¶ 6555; 75-115, 2 CCH Emp. Practices Guide ¶ 6533; 75-103, 2 CCH Emp. Practices Guide ¶ 6529; 75-047, 2 CCH Emp. Practices Guide ¶ 6441, p. 4176; 74-92, 2 CCH Emp. Practices Guide 6424; 74-90 2 CCH Emp. Practices Guide 6423; 74-89, 2 CCH Emp. Practices Guide ¶ 6418; 74-83, 2 CCH Emp. Practices Guide 6414; 74-53, 2 CCH Emp. Practices Guide ¶ 6410; 74-41, 2 CCH Emp. Practices Guide ¶ 6408, p. 4093; 74-34, 2 CCH Emp. Practices Guide ¶ 6407, p. 4089; 73-0499, 2 CCH Emp. Practices Guide ¶ 6402, p. 4079, 74-25, 2 CCH Emp. Practices Guide ¶ 6400, pp. 4071-72; 74-27, 2 CCH Emp. Practices Guide ¶ 6396; 74-08, 2 CCH Emp. Practices Guide ¶ 6390; 74-02, 2 CCH Emp. Practices Guide ¶ 6386, p. 4078; 72-0947, CCH E.E.O.C. Decisions (1973) ¶ 6357; 72-1497, CCH E.E.O.C. Decisions (1973) ¶ 6352; 72-1460, CCH E.E.O.C. Decisions (1973) ¶ 6341; 72-1395, CCH E.E.O.C. Decisions (1973) ¶ 6339, p. 4617, n. 2; 7200427 CCH E.E.O.C. Decisions (1973), ¶ 6312, 72-0284, CCH E.E.O.C. Decisions (1973) ¶ 6304; 71-2682, CCH E.E.O.C. Decisions (1973) ¶ 6288.

quirement, and no black held that position at time of trial."[12] If this suggested standard means that plaintiff must prove that "virtually no" blacks in the area population could meet the requirement, it finds no support in *Griggs*, *Dothard*, or *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The proportion of blacks (5.9%)[13] able to meet the medical center's job requirement was substantially lower than the proportion of women able to meet the height-weight requirement in *Dothard* (41%) or the proportion of blacks able to meet the high school degree requirement in *Griggs* (12%).[14] Title VII is concerned, not with the size of the minority qualifying rate, but with the disparity between the proportion of minorities and non-minorities able to qualify. In this case 16.9% of the whites, but only 5.9% of the blacks, could meet the degree requirement;[15] the white rate was 2.9 times as high as the black rate. In *Griggs*, the white and black rates were 34% and 12%, a ratio of only 2.8. See 401 U.S. at 430, n. 6. In *Dothard*, 99% of the men but only 59% of the women could meet the height-weight requirement, a ratio of 1.7. Thus the disparity in the proportion of minorities able to meet the job requirement in this case is even greater than the disparity in *Griggs* or *Dothard*.

This case is of particular importance because it reflects the reluctance of the Second Circuit to apply to white collar jobs in New York the construction of Title VII established by this Court in cases arising in Alabama[16] and North

[12] Joint Appendix, pp. 277-278A.

[13] Joint Appendix, p. 368A.

[14] See *Dothard* v. *Rawlinson*, 97 S. Ct. 2720, 2727, n. 12.

[15] Joint Appendix, p. 368A.

[16] *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (June 30, 1977).

Carolina.[17] That reluctance seems to arise in part from a misplaced reverence for higher education.[18] The court of appeals was unduly concerned at the prospect of requiring employers to justify a college degree requirement, p. 30a, despite the fact that such a requirement precludes hiring 94.1% of all adult blacks, and even though *Griggs* usually requires such a justification for a high school degree requirement which precludes hiring only 57.5% of all adult blacks.[19] The opinion below also reflects an inappropriate deference to Title VII defenses involving "advanced scientific method," "the fields of scientific knowledge," and "technology" pp. 30a-31a; but federal judges are as capable of evaluating the job-relatedness in these fields as the job relatedness of the requirements for the operation of coal-fired electric power plants,[20] or sophisticated multi-million dollar paper processing machinery,[21] or of a maximum-security prison,[22] and Title VII recognizes no exemption for such positions. Certiorari should be granted to make clear that Title VII requires the elimination for all jobs in all parts of the country, not merely blue collar jobs in regions

[17] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[18] As this Court has noted, "History is filled with examples of men and women who rendered highly effective performance without conventional badges of accomplishments in terms of certificates, diplomas or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality." *Griggs* v. *Duke Power Co.*, 401 U.S. at 433.

[19] Statistical Abstract of the United States, 1976, p. 123.

[20] *Griggs* v. *Duke Power Co.*, 401 U.S. at 426-7.

[21] *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 427.

[22] *Dothard* v. *Rawlinson*, 97 S. Ct. at 2730.

with a history of deliberate discrimination, "of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U.S. at 431.

The particular facts of this case present circumstances of compelling injustice. In *Griggs*, *Albermarle*, and *Dothard*, the employer at least asserted a claim, ultimately rejected by the courts, that the plaintiff's inability to meet the disputed job requirement proved that he or she was incapable of performing the job. In this case, petitioner has in fact been doing the job for 12 years; the court of appeals noted that she had done "a satisfactory job," p. 33a, and respondents candidly conceded "[t]here is no doubt that appellee performs her work in the blood bank laboratory in a competent manner. She is highly regarded by the supervisor of the blood bank . . . "[23] Petitioner reached her position as a Medical Technologist I only after overcoming the special disadvantage of a segregated and inferior public school education prior to *Brown* v. *Board of Education*, 349 U.S. 294 (1954). To dismiss petitioner under these circumstances was as manifestly violative of the Fourteenth Amendment as dismissing her because she had brown eyes or was born under the wrong sign of the zodiac.

[23] Brief for Nassau County Defendants-Appellants, No. 76-7522, p. 3.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit. The decision of the Second Circuit should be summarily reversed; in the alternative, the judgment of the Second Circuit should be vacated and the case remanded for reconsideration in light of *Dothard* v. *Rawlinson*.

Respectfully submitted,

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APPENDIX

Opinion of District Court dated December 8, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 C 294

Margaret Townsend,

Plaintiff,

-against-

Nassau County Medical Center,

Dr. Donald H. Eisenberg, Superintendent,

et al,

Defendants.

MEMORANDUM AND ORDER

WEINSTEIN, D.J.

Plaintiff, a black female, has been employed in the blood bank of the Nassau County Medical Center, satisfactorily doing the work of a Medical Technologist I, since 1965. She brings this suit for reinstatement in that civil service classification. The defendant Nassau County Civil Service Commission has demoted her to a lower paying classification because she lacks a college degree or equivalent academic prerequisites, an eligibility requirement imposed some years after she began her employment. Her claim is that the qualification has an unjustifiable

racially discriminatory impact invalid under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq.

Plaintiff's case is typical of that of many blacks. She attended school in a segregated Florida system. Her high school was apparently so poor that it was abandoned when integration was required and its records are not even available. The movement of many educationally deprived blacks from the South to this district created enormous and expensive burdens for our municipalities. Where, as in this case, a product of that discriminatory educational system has overcome her disadvantage by work experience, Title VII requires her actual job skills to be recognized.

Facts

On June 22, 1965, plaintiff was provisionally appointed to the position of Laboratory Technician at the Nassau County Medical Center. On January 6, 1967 she was provisionally appointed to the position of Senior Laboratory Technician.

Nassau County reclassified all its civil service positions effective July 7, 1967 pursuant to a job survey conducted by the firm of Cresap, McCormack and Paget. As a result, based on the work she had been doing, plaintiff was provisionally placed in a new, competitive position, Medical Technologist. She held this position until December, 1973.

During that period plaintiff also satisfactorily served in several administrative capacities. She was the assistant to supervisor George Davis, responsible for

the laboratory when Mr. Davis was not there. She also was responsible for teaching students blood-banking techniques, since she was one of the few people who had this expertise. Some of her former students are presently employed by Nassau County doing the same work she does, but receiving much higher salaries because they have a college degree and have taken and passed the necessary civil service examinations.

When Mr. Davis left the Medical Center, plaintiff was appointed Acting Supervisor. In addition to her technical duties, she was responsible for all the administrative functions of the supervisor, e.g., payroll, supplies, work schedules, and meetings. After approximately one year, a permanent supervisor was appointed. Plaintiff became his assistant.

In December, 1971, plaintiff was permitted to take the examination required for permanent classification as a Medical Technologist I. Although she did not pass that examination, she was continued provisionally in the position of Medical Technologist I because the eligible list promulgated as a result of the 1971 examination did not contain a sufficient number of names to fill all vacancies.

A second examination for Medical Technologist I was held in April, 1973. The plaintiff's application to take this examination was rejected by the Nassau County Civil Service Commission because she did not have the formal educational qualifications. Plaintiff was discharged in December of 1973 as a result of the promulgation of a Medical Technologist I eligible list based upon the 1973 examination.

Three months later she was rehired by the blood bank, again given the duties of a Medical Technologist I, but given the lower paying classification of Laboratory Technician II.

Although plaintiff's formal education was limited, her qualifications for her work in the blood bank have never been questioned. She began her training in November 1962 at the Hollywood Memorial Hospital in Florida where she studied for one year. She has now had more than ten years experience in blood banking at the Nassau County Medical Center. The testimony was clear that her activities covered the entire range of blood bank technology including typing of patients and donors, cross matching of patients, preparation of blood, covering in the donor room, taking blood, freezing blood, and all related clerical duties. She has routinely decided whether donors could safely give blood, and she has performed microscopic comparisons of blood samples. As already noted, for a period of five months, she served as Acting Supervisor for the entire blood bank, and she has trained many of the people who now work above her. Linda Schwaid, a permanent Medical Technologist I, for example, testified that plaintiff taught her everything she now knows about bloodbanking. Frank Appelwaithe, the present Supervisor, testified that he would rate the plaintiff among the top members of the department.

It is clear that there is no meaningful specialization of labor within the blood bank. The witnesses agreed that the press of the work requires each member to be familiar with and to perform all functions.

Thus, except for assuming added teaching and supervising duties, the plaintiff is presently doing as a Laboratory Technician II exactly what she had done and would do as a Medical Technologist I.

There is no evidence of bad faith in the defendants' reclassification of civil service jobs. The testimony of Albert Fontana, one of the personnel specialists involved in the reclassification survey at the Medical Center, established that a systematic effort was made to correlate job title with job content. It is apparent, however, that, notwithstanding the defendants' good intentions, an outstanding black employee has been frozen out of a position for which she has demonstrated eminent qualifications.

Law

The statutory basis for plaintiff's attack on job qualifications is Section 703 of Title VII of the Civil Rights Act of 1964 providing:

> "(a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000-e.

Interpreting this statute in Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971), the Supreme Court held that requirements which operate to disqualify blacks in disproportionate numbers violate the Act unless they can be shown to be related to successful job performance. Considering the validity of a high school diploma and general aptitude tests as job qualifications, the Court wrote:

> "Congress has now... required that the posture and condition of the jobseekers be taken into account....The Act proscribes not only overt

> discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

401 U.S. at 431, 91 S.Ct. at 853.

The Court rejected the view that an employer's intent is conclusive in determining whether a prima facie case of job discrimination has been established:

> "...good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability....Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

401 U.S. at 432, 91 S.Ct. 854 (Emphasis

in original.).

Under Griggs the plaintiff carries the initial burden of showing that a job qualification has a racially disproportionate impact. Once this prima facie case is made out, the burden shifts to the employer to prove "a manifest relationship to the employment in question." In Albermarle v. Moody, ___U.S.___,___, 95 S. Ct. 2362, 2375 (1975), the Court strengthened the position of the complaining party by ruling that he or she will prevail on a demonstration that alternative, non-discriminatory means exist which would accurately test the qualifications of employees. See, The Supreme Court, 1974 Term 89 Harv. L. Rev. 47, 228-229, n. 27 (1975). Cf. Boston Chapter NAACP, Inc. v. Beecher, 504 F. 2d 1017, 1019 (1st Cir. 1974); Vulcan Society v. Civil Service Commission, 490 F. 2d 387, 392 (2d Cir. 1973).

A. Prima Facie Discrimination

In support of her prima facie case, plaintiff offered data compiled by the Bureau of the Census for 1970. This statistical evidence demonstrates the extent to which a college degree requirement discriminates against blacks in New York State and Nassau County. In New York State 12.7% whites as compared to 4.2% blacks (males and females) age 25 years and older have completed 4 years of college or more. In Nassau County, 34.5% whites as compared to 12.4% blacks, age 25 years and older, have a college degree. These statistics are broken down to reveal sex differences

as well as racial distinctions. The total population of white males in Nassau County age 25 years and older is 370,219. 84,728 white males have four years of college or more. By contrast only 986 of a total population of 13,032 black males in Nassau County have achieved that level in education. The total population of white females in Nassau County age 25 years and older is 423,529. 50,036 white females have four or more years of college. But only 916 of 19,025 black females have achieved an equal educational status. The group with the lowest percentage of members holding a college degree in Nassau County is black females; only 4.7% of them have college degrees.

Statistical evidence of educational disparity in an appropriate geographical area is sufficient to establish the disproportionate racial impact of a degree requirement for Title VII purposes. In Griggs, North Carolina census statistics alone were relied upon by the Court for the proposition that a high school diploma requirement was racially discriminatory. 401 U.S. 424, 431, fn. 6, 91 S. Ct. 849, 853. Statistics on the completion of high school in the South and the Atlanta area were relied upon in United States v. Georgia Power Company, 474 F.2d 906, 918 (5th Cir. 1973) as sufficient evidence of discriminatory impact. See also, Johnson v. Goodyear Tire and Rubber Co. Synthetic Rubber Plant, 491 F. 2d 1361, 1371 (5th Cir. 1974) (census data on educational achievement of blacks and whites in Texas and Houston area).

In the present case, state and

county statistics demonstrate an approximately three times higher proportion of white as compared to black females who have attended four or more years of college. These statistics establish a prima facie case that a degree requirement has a disproportionate impact on blacks.

Comparable evidence as to the racial impact of the Medical Technologist I examination has not been presented. Because plaintiff was not dismissed for failure to pass that examination, it is not now before the court. Nothing said in this memorandum should be construed as touching on the validity of the examination under Title VII or any other theory since no evidence was adduced on this issue.

B. Failure to Show Job-Related Justification

The Equal Employment Opportunity Commission has approved three methods of validation to establish the requisite relationship between a qualification and job performance. EEOC Guidelines, 29 C.F.R. 1607. The Supreme Court in Albermarle, supra, stated that these guidelines are entitled to great deference.

> "The EEOC has issued 'Guidelines' for employers seeking to determine, through professional validation studies, whether their employment tests are job related. 29 CFR Part 1607 (1974). These Guidelines draw upon and make reference to professional

> standards of test validation established by the American Psychological Association. The EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency', and consequently they are 'entitled to great deference.' Griggs v. Duke Power Co., supra, 401 U.S., at 433-434, 91 S. Ct., at 854. See also Espinoza v. Fara Mfg. Co., 414 U.S. 86, 94, 94 S.Ct. 334, 339, 33 L.Ed. 2d 287. The message of these Guidelines is the same as that of the Griggs case -- that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 CFR § 1607.4(c)."

___U.S. at___, 95 S.Ct. at 2378 (footnotes omitted).

Section 1607.2 of the Guidelines

provides that an educational requirement is to be treated as a test for purposes of determining its validity. Section 1607.5(a) discusses criterion, content, and construct validation, the three techniques which have been recognized by the EEOC:

> "(a) For the purpose of satisfying the requirements of this part, empirical evidence must be based on studies employing generally accepted procedures for determining criterion related validity such as those described in 'Standards for Education and Psychological Tests and Manuals' published by American Psychological Association.... Evidence of content or construct validity as defined in that publication, may also be appropriate where criterion validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well developed tests that consist of suitable samples of the essential knowledge,

> skills or behaviors composing the job in question. The types of knowledge, skills or behavior contemplated here do not include those which can be acquired in the brief orientation to the job."

Criterion related validation -- the preferred method -- would require a showing that those who possess a degree perform better in the blood bank in terms of identifiable criteria, than those who do not. See Vulcan Society v. Civil Service Commission, 360 F. Supp. 1265, 1273 (S.D. N.Y.), affirmed in part and remanded with respect to issues not decided on the merits, 490 F. 2d 387 (2d Cir. 1973). No credible evidence has been submitted to support this proposition in this case. Mrs. Townsend, without a degree, is considered by her supervisor and others to be one of the outstanding members of the blood bank staff.

The second method, content validation, would entail proof that the aptitudes, skills, and training necessary to obtain a degree are equivalent to the skills and training required for successful performance in the blood bank. See Vulcan Society v. Civil Service Commission, 360 F. Supp 1265 at 1274. Construct validation would necessitate proof that the requirements for a degree accurately test for the general mental and psychological traits which are needed in the blood bank. See Vulcan

Society v. Civil Service Commission, 490 F. 2d 287 at 395.

The evidence submitted in this case does not support the proposition that an acceptable college program relates to the practical demands of the blood bank. As noted, Linda Schwaid, a Medical Technologist I, testified that she obtained all her training from the plaintiff. Moreover, under the Guidelines, content and construct validation may be used only upon a showing that criterion validation is not feasible. 29 C.F.R. § 1607.5(a) (1974); see also, The Supreme Court, 1974 Term 89 Harv. L. Rev. 47, 233 (1975). No such showing has been made here.

Defendants did not produce any credible testimonial or documentary evidence to demonstrate the validity of either the college degree or certification requirements for the position of Medical Technologist I pursuant to any of the accepted methods of validation. Witness Fontana indicated that no consideration was given to validating the degree qualification during the preparation of the Cresap survey. According to the testimony, the development of class specifications for each job at the Medical Center was based on responses to questionnaires distributed to employees and supervisors. The criteria relied on by the supervisors in making their recommendations is not known. See Albermarle Paper Company v. Moody, ___U.S.___,___, 95 S.Ct. 2362, 2379 (1975) (employer's validation study for aptitude tests fatally undermined by reliance on supervisorial rankings based on vague standards). The only other evidence

introduced to justify the inclusion of the college degree in the Medical Technologist I specifications showed that New York City requires a degree for a similar position and two federal bulletins recommend college education for medical technologists. This evidence is not sufficient to establish the validity of the degree requirement for the position of Medical Technologist I at the Nassau County Medical Center for this case in light of plaintiff's proven qualifications.

The court does not rule on the validity of the degree requirement except in the special circumstances of the case before it. Mr. Appelwaithe the supervisor did suggest that a college degree might be useful. In addition, Ms. Schwaid testified that her undergraduate education was helpful in enabling her to read the literature in the field. Although no direct evidence was presented on this point, a degree or its equivalent might guarantee that new applicants possess the skills and learning needed for successful training in the blood bank. This question would have to be explored in any future litigation. But, in any event, under Title VII an inherently discriminatory safeguard cannot be applied woodenly to deny job status to a current employee who has achieved all applicable learning and skills through practical experience.

This reasoning is understood by the District of Columbia Circuit's decision in Berger v. Board of Psychologist Examiners, ___F.2d___,No. 74-1047, 44 L.W. 2235 (D.C. Cir. Oct. 28, 1975), partially striking down a federal statute prescribing minimum

educational requirements for all psychologists practicing in the District of Columbia. The Court held that the Fifth Amendment Due Process Clause guarantees current practitioners an alternative means of demonstrating his or her professional qualifications as against a conclusive statutory presumption of incompetence. The Court's language reflects an appreciation of the value of practical experience. It wrote:

> "Possession of a graduate degree in psychology does not signify the absorption of a corpus of knowledge as does a medical, engineering, or law degree; rather it is simply a convenient line for legislatures to draw, on the brave assumption that whatever is taught in the varied graduate curricula of university psychology departments must make one a competent psychologist, or at least competent enough to be allowed to take a licensing examination. While it may not be irrational to assume that this academic background should in the future be a requisite to the practice of psychology, it is of questionable rationality to insist that current practitioners, who may have studied and practiced at a time when graduate courses in psychology were even less meaningful, are conclusively incapable of meeting today's new standards because they did not take those courses."

Slip Op. at 226.

The Court carefully distinguished the rights of current practitioners from those of future applicants.

> "Here the irrebuttable presumption of professional incompetence absent a graduate degree is not invalid with respect to future psychologists, but only with respect to current practitioners who have no meaningful grandfather rights....The inequity of the statute is that it fails to account for those competent psychologists who embarked upon their profession when no degree was required and who thus are denied a fair opportunity to come within the statute's licensing requirements at this point."

Slip Op. at 228.

If the right of a current, qualified practitioner to maintain his or her employment cannot be extinguished by statute, it follows, a fortiori, that such a result

may not be accomplished by regulations which conflict with statutory policies against racial discrimination.

Conclusion

Plaintiff must be reclassified as a provisional Medical Technologist I, retroactive to December 31, 1973, the date of her dismissal. Pursuant to 42 U.S.C. § 2000e-5(k), plaintiff is entitled to back pay in the amount she would have earned as a Medical Technologist I less what she actually earned during this period. In addition, plaintiff is entitled to take any future Civil Service examinations for permanent classification as a Medical Technologist I. Plaintiff is also entitled to attorney's fees. 42 U.S.C. § 2000e-5(k); Albermarle Paper Company v. Moody, ___U.S.___,___, 95 S. Ct. 2362, 2370 (1975).

Unless the parties stipulate with respect to back pay and fees, counsel for plaintiff shall submit an affidavit on the issue within ten days. Within twenty days defendants may either answer by affidavit or demand a hearing. Within thirty days, the parties shall submit a joint order or individual orders consistent with the court's determination. Agreement on the form of an order shall not constitute acquiescence in its validity or waiver of the right to appeal.

So ORDERED.

Dated: Brooklyn, New York
December 8, 1975.

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of June one thousand nine hundred and seventy-six

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

MARGARET TOWNSEND,
Plaintiff-Appellee,

-against-

NASSAU COUNTY MEDICAL CENTER, et al,

Defendants-Appellants.

No. 76-7003

Order of Court of Appeals dated June 21, 1976

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated and the case is remanded for reconsideration in the light of Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), particularly Part III thereof.

/s/_____
HENRY J. FRIENDLY

/s/_____
WILFRED FEINBERG

/s/_____
ELLSWORTH A. VAN GRAAFEILAND

U.S.C.JJ.

Judgment of District Court dated September 27, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

75 C 294

MARGARET TOWNSEND,

Plaintiff,

-against-

NASSAU COUNTY MEDICAL CENTER,

DR. DONALD H. EISENBERG, Superintendent,

et al,

Defendant.

JUDGMENT

This matter having been remanded by the Court of Appeals for the Second Circuit by Order dated the 21st day of June, 1976 for reconsideration, and the matter having been set down for oral argument before this Court on the 24th day of September, 1976, the plaintiff having been represented by McEVILY, GRADESS & KLUEWER, by SUSAN KLUEWER and DONNA CLEAR, Legal Intern, Community Legal Assistance Corporation, and the defendants having been represented by JAMES M. CATTERSON, JR., County Attorney of Nassau County by JAMES N.

GALLAGHER, Deputy County Attorney, it is hereby

ORDERED, ADJUDGED AND DECREED that the original judgment in favor of plaintiff dated the 26th day of February, 1976 and heretofor entered on the 27th day of February, 1976 is in all respects confirmed for the reasons stated orally at the hearing. (JBW)

Dated: Brooklyn, New York
September 27, 1976

/s/ JACK B. WEINSTEIN
United States District
Court Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 827—September Term, 1976.

(Argued April 1, 1977 Decided June 30, 1977.)

Docket No. 76-7522

MARGARET TOWNSEND,

Plaintiff-Appellee,

—against—

NASSAU COUNTY MEDICAL CENTER; DOCTOR DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION; GABRIEL KOHN, CHAIRMAN; EDWARD S. WITANOWSKI, EDWARD A. SIMMONS, ADELE LEONARD, Executive Director of NASSAU COUNTY CIVIL SERVICE COMMISSION; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; ESRA H. POSTEN, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and GURFEIN,

Circuit Judges.

Appeal from a judgment and order of the United States District Court for the Eastern District of New York (Weinstein, *J.*) that defendants had violated Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and ordering that plaintiff employee be reinstated with back pay.

Reversed.

MATTHEW A. TEDONE, Deputy County Attorney, Mineola, N.Y. (Natale C. Tedone, Senior Deputy County Attorney, William S. Norden, Deputy County Attorney, and William Gitelman, County Attorney of Nassau County, Mineola, N.Y., of counsel), *for Defendants-Appellants.*

SUSAN KLUEWER, Community Legal Assistance Corp., Hempstead, N.Y. (McEvily & Kluewer, Hempstead, N.Y., of counsel), *for Plaintiff-Appellee.*

GURFEIN, *Circuit Judge:*

This individual Title VII action[1] is before us the second time.[2]

Appellee Margaret Townsend, a black female, began work on June 22, 1965 as a blood bank technician, at the Nassau County Medical Center, a county facility subject to the New York Civil Service Law. When Mrs. Townsend was appointed provisionally as a "Senior Laboratory Technician," that position required graduation from high

1 42 U.S.C. § 2000e *et seq.*

2 On June 21, 1976, this court by order vacated a judgment for the plaintiff entered in the United States District Court for the Eastern District of New York after a trial before the Hon. Jack B. Weinstein. We remanded the case "for reconsideration in the light of *Washington* v. *Davis* [426 U.S. 229 (1976)], particularly Part III thereof." On remand, Judge Weinstein confirmed his original order and the judgment for the plaintiff described below. The defendants now seek review of both judgments.

school, completion of an approved two-year course in medical technology, and two years experience as a technician in a medical laboratory or a satisfactory equivalent of a combination of training and experience. As a result of a survey conducted for the County by the firm of Cresap, McCormick and Paget, the County adopted a reclassification of all County positions subject to Civil Service effective July 7, 1967. Under the reclassification, Mrs. Townsend's job was designated "Medical Technologist I" and new prerequisites for appointment to a permanent position were established. It became necessary to pass a competitive examination which could be taken only by those holding either a bachelor of science degree or a certification by the American Society of Clinical Pathologists ("ASCP").[3] The County mitigated these new requirements, however, with a "grandfather clause" providing that incumbents who had served at least one year prior to July 7, 1967, in positions whose prerequisites were affected by the reclassification adopted by the County Civil Service Commission, would be permitted once to take the examination for his new title, regardless of the announced training and experience requirements, "but that for ensuing examinations it would be necessary for him as well as all other candidates to meet the qualification requirements of the test announcements."[4]

Appellee Townsend was accordingly permitted to take the examination given in 1971, although she had neither a college degree nor ASCP certification. Unfortunately, she failed to pass the examination. Another person in the same blood bank, also without the requisite academic

3 One of the requirements for ASCP certification was a B.S. degree.

4 Specifically, incumbents would be permitted to take the first examination administered *after* the promulgation of the "grandfather clause" on December 9, 1968.

qualification, passed it. Mrs. Townsend was, nevertheless, permitted to continue as a Medical Technologist I in a provisional status because the list of eligibles resulting from the 1971 examination was insufficient to fill all positions.

A second examination for Medical Technologist I was administered in April, 1973. In accordance with the limited "grandfather clause," Mrs. Townsend's application to take the examination was rejected by the Nassau County Civil Service Commission, because she lacked the formal educational qualifications. As a result of the promulgation of a Medical Technologist I eligible list based upon the 1973 examination, Mrs. Townsend was discharged in December of 1973. Three white incumbents were similarly discharged. *See* note 8, *infra*. Three months later appellee was rehired by the blood bank and given the duties of a Medical Technologist I. However, she was placed in the lower paying classification of a Laboratory Technician II. In short, Mrs. Townsend was, as the litigants and the District Court recognized, in effect demoted to a lower paying classification because she lacks the formal academic prerequisites to take future examinations which were imposed some years after she began her employment, and because she failed the "grace" examination.

Mrs. Townsend then brought suit for reinstatement with back pay, alleging that the requirement of either a B.S. degree or ASCP certification violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The essence of her Title VII theory is that the requirement of a B.S. degree or an ASCP certification has a disproportionate racial impact since far fewer blacks than whites in the general population have college degrees; and that the requirement violates Title VII because it is insufficiently job-related.

After a trial without a jury, the District Court held that appellee had established a *prima facie* case of discrimination and that appellants had not met their burden of justifying the academic prerequisites as job-related in their application to Mrs. Townsend. A distinction was perceived, however, between the rights of a person holding a job and a person seeking a job in the first instance. The District Court expressly disclaimed any intention to adjudicate generally whether these academic requirements were sufficiently job-related to be valid. Rather, it held that Title VII mandates that an employer must recognize the *actual* demonstrated job skills of a minority employee whether those skills are acquired through practical experience or through formal training. The court ruled that the educational requirements could not be applied so as to exclude a black employee "from a position for which she has demonstrated eminent qualifications."

In finding that the academic prerequisites were "inherently discriminatory"—*i.e.*, in finding a *prima facie* case of discrimination—Judge Weinstein recognized that the defendants had acted in good faith and with good intentions. Nevertheless, he observed that a job requirement violates Title VII if it has a racially disproportionate impact. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Noting that, in the general populations of Nassau County and New York State, proportionately far more whites have college degrees than do blacks—and especially female blacks—Judge Weinstein concluded that this statistical evidence of educational disparity was itself enough to establish the disproportionate racial impact of a degree requirement.

Having concluded that "a college degree requirement discriminates against blacks in New York State and Nassau County," Judge Weinstein next considered whether

appellants had shown that this requirement was job-related. *See Griggs, supra; Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). He found no evidence indicating that persons with college degrees perform better as medical technologists than those who do not. The District Court concluded that since the plaintiff had demonstrated her actual job qualifications by on-the-job performance, a college degree could not be required as a prerequisite to employment *in her case*. The court limited its ruling on the validity of the degree requirement, however, to "the special circumstances of the case before us." In short, the ruling of the District Court amounted to an *ad hoc* determination that Mrs. Townsend, by virtue of her demonstrable skill in the blood bank, was entitled to take another examination, and to retain her provisional status, without any time limitation, despite the existence of an unfilled eligible list.

The District Court, accordingly, ordered that: (1) plaintiff Townsend be reclassified as a provisional Medical Technologist I retroactive to December 31, 1973; (2) plaintiff be awarded back-pay for 1974 and 1975; and (3) plaintiff not be disqualified from taking future civil service examinations for permanent classification as Medical Technologist I by reason of her not having a college degree or certification by ASCP. The court made no provision for how long the plaintiff could remain in provisional status without passing an examination.

Mrs. Townsend can gain redress in the federal court only if she has suffered discrimination—either intentional or "objective"—because of her race or sex, or upon the ground that substantive due process protects incumbent job-holders from standards for permanent qualification created only after years of satisfactory service on the job.

We agree with the Nassau County defendants that appellee did not prove a *prima facie* case of racial discrimination against herself under Title VII and that she was not denied any "substantive due process" right.

As far as the *prima facie* case of discrimination is concerned, appellee adduced no evidence whatsoever of intentional discrimination, past or present, either by the County or by the Medical Center. It is well-established, however, that a *prima facie* case may be made through evidence that an employment test or qualification has as a consequence "an exclusionary effect on minority applicants." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803 n.14 (1973). *See Washington* v. *Davis*, 426 U.S. 229, 252 (1976). Even as far as adverse racial impact is concerned, however, the only evidence offered by appellee were 1970 census statistics showing that in Nassau County college degrees are held by only 12.4% of blacks age 25 years or over, as opposed to 34.5% of whites, and by only 4.7% of black females, as opposed to 11.8% of white females.[5] There were no statistics for the B.S. degree in particular.

Neither *Griggs, supra*, nor *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1361 (5th Cir. 1974), or *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), relied upon by appellee, support the proposition that statistical evidence concerning only the general population is sufficient to demonstrate that a job prerequisite "operates to exclude" minorities. In all of these cases plaintiffs established that virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant.[6]

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5 Similar statistics concerning the population of New York State as a whole were also submitted into evidence.

6 It is true that in *Griggs*, as well as *Georgia Power*, and *Goodyear Tire & Rubber Co.*, the courts noted that the educational requirements at issue were satisfied only by a disproportionately low number of blacks. *See* 401 U.S. at 430 n.6; 491 F.2d at 1371; 474 F.2d at 918. But these statistics concerning the general population were relevant,

If we were to hold that a bare census statistic concerning the number of blacks in the *general population* who have college degrees could establish a *prima facie* case of discrimination, every employer with a college degree requirement would have the burden of justifying the degree requirement as job-related. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The burden of showing job-relatedness cast upon the employer does not arise until due discriminatory *effect* has been shown. *General Electric Co.* v. *Gilbert*, —— U.S. ——, 97 S. Ct. 401, 408-09, 45 U.S.L.W. 4031 at 4034 n.14 (Dec. 7, 1976). "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption against a college degree requirement. The requirement of a college degree, particularly in the sciences, seems to be in the modern day of advanced scientific method, a neutral requirement for the protection of the public. No doubt such a requirement could serve as a pretext for racial or sex discrimination, but this consequence should not be assumed. There will be time, if a showing of racial impact is made, for the comparison of the requirement of a degree in medicine, law, engineering or other professions with such a requirement for a laboratory technologist who is required by her Civil Service Title to be skillful in clinical chemistry, microbiology, blood-banking, serology, and hematology in more than one laboratory.

not to establish the prima facie case of discrimination which had already been made, but to demonstrate that the racially disparate impact on defendant employer's workforce which was *otherwise* established, was *due to* the challenged job requirement, and not to some other practice of the employer or other cause.

The relative function of the academic prerequisites to job-relatedness varies inversely with the risk to the health and safety of the public who depend upon the technology. *See Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (college degree for flight officer held job-related); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859, 862 (7th Cir. 1974); 29 C.F.R. 1607.5(c)(2)(iii): ". . . a relatively low relationship may prove useful when the [economic and human] risks are relatively high." The issue will be whether a B.S. degree is substantially related to job performance. *Cf. Griggs, supra,* 401 U.S. at 431. But the fields of scientific knowledge are too disparate, and cover too many disciplines, for the mere existence of general college degree statistics in the general population, without more, to sustain a presumption of racial discrimination.

In refusing to adjudicate whether the college degree requirement discriminated against blacks in general, including potential future applicants, the District Court itself recognized that the adoption of a college degree requirement cannot, merely because of the general racial composition of college graduates, be considered discriminatory. Judge Weinstein noted that "although no direct evidence was presented on this point, a degree or its equivalent might guarantee that new applicants possess the skills and learning needed for successful training in the blood bank. This question would have to be explored in any future litigation."[7]

It was precisely because the District Court was unwilling to hold that the requirement of a B.S. degree, neutral on its face, makes out a *per se* violation, that the District Court had to award relief to Mrs. Townsend on an *ad hoc* basis.

7 The District Court credited the testimony of Mr. Applewhaite, the supervisor, "that a college degree might be useful."

Unfortunately, we see no legal ground for such *ad hoc* relief. Surely, if we restrict our consideration to Mrs. Townsend individually, no inference of racial discrimination against her alone is possible, *cf. McDonnell Douglas* v. *Green, supra.* When the new job qualifications were promulgated she was "grandfathered" into one examination despite her acknowledged lack of the threshold prerequisite academic standing. Although she failed this examination, there is no claim—nor was evidence adduced—that the examination violated Title VII. Indeed, at least one incumbent afforded the opportunity to take the "grandfather" exam, passed it. And of the four incumbents who, like Mrs. Townsend, were demoted for failure to satisfy the new job requirements, three were white.[8] In short, the newly promulgated prerequisites, neutral on their face, were applied to each employee at the blood bank in a uniform and racially neutral manner.

Similarly, we see no basis for awarding *ad hoc* relief to Mrs. Townsend under a "substantive due process" theory. It might be argued that, wholly apart from racial implications, a state employee—even a provisional one—is entitled to some sort of due process protection against the subsequent promulgation of more stringent civil service requirements. A panel of the District of Columbia Circuit has held that, in the absence of a "grandfather clause," the promulgation of a degree requirement for licensure as a psychologist is an impermissible "irrebuttable presumption" that psychologists who have practiced for many years without benefit of academic degree are incompetent. *Berger* v. *Board of Psychologist Examiners,* 521 F.2d 1056 (D.C.

8 These people, according to a sworn affidavit on the motion for a preliminary injunction of Ronald J. Levinson, Deputy Executive Director of the Nassau County Civil Service Commission, were Frederick Miller, Jean Wilson and Jean Bush, all white persons. The affidavit was not controverted on the motion.

Cir. 1975). We need not consider, however, whether the status of a provisional Civil Service employee is distinguishable from that of an individual practitioner, in terms of an alleged "vested right" protected by due process. *Cf. Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Russell* v. *Hodges,* 470 F.2d 212 (2d Cir. 1972). Nor need we consider whether the heavily criticized "irrebuttable presumption" theory of due process retains its vitality. *See Weinberger* v. *Salfi,* 422 U.S. 749 (1975): Note, *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 Harv. L. Rev. 1534 (1974). For Mrs. Townsend was not confronted with any *irrebuttable* presumption of incompetence. Under the terms of the "grandfather clause" she had a chance to rebut any such presumption by passing the examination which she was permitted to take in spite of her lack of academic credentials. Thus the only issue that remains is whether it was reasonable for the County, in its "grandfather clause," to limit its waiver of the academic requirement only to the extent of permitting an incumbent—white or black—to take one examination, rather than several. We cannot say that the choice made by the County to limit the waiver to one examination was irrational. *Cf. City of New Orleans* v. *Dukes,* 96 S. Ct. 2513 (1976) ("grandfather clause" limited by number of years pushcart vendor is in operation).

There is no doubt that Mrs. Townsend presents an appealing case, not because she is female or black, but because she has done a satisfactory job for several years and is now required to perform essentially the same duties for less pay than is given to some of her own former trainees who have qualified for permanent civil service positions. We can understand the desire of the District Court to redress an "inequity" by using its power to effect

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such redress. The question is whether Title VII authorizes the exercise of such an ameliorative function by a District Court in this way. We feel constrained to say that, on these facts, were the District Court judgment to stand, this hard case would make bad law. Bare figures on college degree distribution in the general population do not, in themselves, prove discrimination based on race, sex, or ethnic or national origin, in fields of scientific training in which risks to human life are involved. The black community has already made tremendous strides in achieving academic degrees, and, happily, there appears to be continuing, steady progress. In any event, should a college degree requirement ever be interposed as a prerequisite simply as a pretext for disqualifying members of the black community, the courts will be alert to deal with violations of Title VII. But we cannot say that this is such a case.

Reversed with directions to dismiss the complaint.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of August, one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
HON. MURRAY I. GURFEIN,

Circuit Judges.

MARGARET TOWNSEND,

Plaintiff-Appellee

v.

NASSAU COUNTY MEDICAL CENTER, DR. DONALD H. EISENBERG, SUPERINTENDENT, NASSAU COUNTY CIVIL SERVICE COMMISSION, GABRIEL KOHN, etc.,

Defendants-Appellants

DOCKET NO. 76-7522

Order of Court of Appeals dated August 24, 1977

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellee

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO,
Clerk

/s/ By: SARA PIOVIA
Deputy Clerk

Supreme Court, U. S.
FILED
DEC 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-718

MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the District Court, which is not reported, is set out in petitioner's appendix, pp. 1a-18a. The order of the Court of Appeals vacating the District Court judgment and remanding for reconsideration, is reported at 538 F. 2d 314, and is set out in petitioner's appendix, pp. 19a-20a. The judgment of the District Court confirming its original judgment, which is not reported, is set out in petitioner's appendix, pp. 11a-22a. The opinion of the Court of Appeals, is reported at 558 F. 2d 117, and is set out in petitioner's appendix, pp. 23a-34a. The order of the Court of Appeals denying rehearing, which is not yet reported, is set out in petitioner's appendix, pp. 35a-36a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S. Code §1254(a).

Questions Presented

1. Whether petitioner made a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 in light of this Court's decision in *Dothard* v. *Rawlinson*, 97 S. Ct. 2720, 53 L. Ed. 2d 786?

2. Whether statistics relating only to the general population and not to the employment practices of respondents is sufficient to raise a presumption of discrimination against a Bachelor of Science degree or an ASCP certification requirement in the sciences, as required for a Medical Technologist I position in the various medical laboratories of a large county hospital?

3. Whether an analysis of the characteristics of actual applicants is appropriate considering the facts and circumstances of the instant case?

4. Whether petitioner was denied any "substantive due process" right when she was unable to comply with a newly implemented requirement that a medical technologist I be required to have a Bachelor of Science degree, or an ASCP certification, in order to take a civil service examination notwithstanding the fact that she had been the beneficiary of a "grandfather clause", and had taken and failed said examination in 1971?

Statutes and Regulations Involved

The pertinent provision of the statute involved is set forth in the petition at p. 3 thereof. The pertinent provision of the regulation involved is 29 C.F.R. 1607.5(c)(2)(iii) at p. 10 of respondents' brief in opposition to the petition for certiorari.

Statement

On June 22, 1965, petitioner Margaret Townsend (hereinafter "petitioner") commenced work at the Nassau County Medical Center (hereinafter "NCMC") (A. 65).* Petitioner was appointed to the position of laboratory technologist I (A. 66-67). As a result of an evaluation survey conducted by the firm of Cresap, McCormick & Paget, petitioner was reclassified as a provisional medical technologist I in July 1967 (A. 68, 95). The aforementioned evaluation study, which commenced in 1965, was an undertaking to reclassify all civil service positions within Nassau County (A. 195-196, 200-201).

As a result of the Cresap, McCormick and Paget survey, the new job specifications and qualifications for the position of medical technologist I became effective in July of 1967 (A. 200). A bachelor of science degree or certification by the American Society of Clinical Pathologists (hereinafter "ASCP"), in addition to passing a competitive examination, became prerequisites for the position of medical technologist I (A. 250). Although petitioner had neither a bachelor of science degree, nor ASCP certification, by virtue of a "grandfather clause" she was permitted to take the competitive examination for the position of medical technologist I which was given on December 4,

*Refers to page numbers in Joint Appendix.

1971 (A. 80). Had petitioner passed this examination, she would have been accorded permanent status as a medical technologist I, as was Mr. Allen Scimeca (A. 161-162), regardless of whether or not she possessed any formal degrees or certification (A. 168). However, petitioner failed the examination and now seeks to be reinstated as a provisional medical technologist I.

There is no doubt that petitioner performs her work in the blood bank laboratory in a competent manner. She is highly regarded by the supervisor of the blood bank laboratory, Mr. Frank Applewaite, who like petitioner, is black (A. 131, 142). Specifically, petitioner works as a phlebotomist in the blood bank laboratory (A. 138). Of the fourteen persons who work in the blood bank laboratory under the supervision of Mr. Applewaite, only three or four persons have a medical technologist title (A. 133, 144). It appears that all the persons in the blood bank laboratory, except for the supervisor and assistant supervisor, perform the same duties, regardless of title (A. 133, 151, 174).

Even though she did not pass the examination in December, 1971, petitioner was permitted to continue in the position of provisional medical technologist I because the eligible list promulgated as a result of the 1971 examination did not contain a sufficient number of names to fill all the vacancies (A. 292).

A second examination for medical technologist I was held in April, 1973 (A. 293). Petitioner's application to take this examination was rejected by respondent Nassau County Civil Service Commission (hereinafter "Commission") because she lacked the prerequisites (i.e. bachelor of science degree or ASCP certification) for the position (A. 82). Petitioner was discharged on December 31, 1973 with three other provisional medical technologists, all of whom

were white (A. 34), as a result of the promulgation of a medical technologist eligible list based upon the 1973 examination (A. 293). Within three months petitioner was rehired by NCMC in March 1974 as a laboratory technician II, a lower graded classification than medical technologist I (A. 86).

The position of medical technologist I is utilized in all laboratories within NCMC, and is not limited to the blood bank laboratory (A. 148, 350). The job specification for medical technologist I, which came into being as a result of the Cresap, McCormick & Paget survey, was intended by those taking part in the survey to encompass duties in each and every laboratory within NCMC (A. 222).

Petitioner brought this action pursuant to 42 U.S.C. 2000e et seq. by summons and complaint dated February 25, 1975 (A. 5). Petitioner's motion for a preliminary injunction was denied by order dated May 9, 1975 (A. 2). By decision and order dated December 8, 1975 (A. 289-308), the District Court found that the prerequisites for the position of medical technologist I (i.e. bachelor of science degree or ASCP certification), while they do not operate to discriminate against blacks generally have operated to discriminate against petitioner solely because of her race in violation of 42 U.S.C. 2000e et seq.

Respondents appealed to the United States Court of Appeals for the Second Circuit from the order dated December 8, 1975 and a judgment dated February 26, 1976 (A. 331-332) of the District Court. By order dated June 21, 1976 (A. 427), the United States Court of Appeals, Second Circuit, vacated the judgment of the District Court and remanded for further hearing in light of *Washington* v. *Davis*, 426 U.S. 229, 48 L. Ed. 597 (1976). On remand, the District Court wholly failed to enunciate either verbally or otherwise, its reasons for confirming its original order

(A. 331) and subsequent judgment (A. 433-440). A judgment was made on September 27, 1976 (A. 441) adverse to respondents. Respondents served and filed a notice of appeal (A. 443) to the United States Court of Appeals for the Second Circuit, requesting a review of the District Court order and decision of December 8, 1975, the judgment of February 26, 1976 and the judgment of September 27, 1976.

On June 30, 1977, the Court of Appeals unanimously reversed the judgment with directions to dismiss the complaint on the ground that petitioner failed to make a *prima facie* case of racial discrimination. Petitioner filed a petition for rehearing on or about July 14, 1977 in light of *Dothard* v. *Rawlinson,* 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977). The petition was denied without opinion on August 24, 1977. Petitioner thereafter brought on the instant petition for a writ of certiorari in this Court which was received by respondents on November 21, 1977.

ARGUMENT

Petitioner Failed to Make a *Prima Facie* Case of Racial Discrimination and the Complaint Was Properly Dismissed.

Petitioner relies on *Dothard* v. *Rawlinson,* 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977) for the proposition that general population statistics proffered in the case at bar warrant the conclusion that the plaintiff has made a *prima facie* case. Furthermore, petitioner relies upon *Dothard* v. *Rawlinson, supra,* for the proposition that there is no requirement that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants.

Respondents submit that the holding in *Dothard, supra,* does not demonstrate inconsistency with the holding in the case at bar for the following reasons.

Firstly, as far as the *prima facie* case of discrimination is concerned, petitioner adduced no evidence whatsoever of intentional discrimination, past or present, by respondents.

Secondly, statistics relating to the general population, and not to the employment practices of the respondents are not sufficient to raise a presumption against a college degree requirement, particularly in the sciences. The instant case does not concern itself with height and weight requirements as did *Dothard,* cited *supra.*

Thirdly, if bare census statistics concerning the number of blacks in the general population who have college degrees establishes a *prima facie* case of discrimination, every employer with a college degree requirement would have the burden of justifying the degree requirement as job related. Respondents cannot agree that this was the intent or purpose of the Civil Rights Act.

Fourthly, bare figures on college degree distribution in the general population do not, in themselves, prove discrimination in fields of scientific training in which risks of human life are involved.

Fifthly, the trilogy of cases, *Dothard* v. *Rawlinson, supra, Hazelwood School District* v. *United States,* 53 L. Ed. 2d 768 (1977) and *Teamsters* v. *United States,* 52 L. Ed. 2d 396 (1977) on the use of statistics does not point to a different conclusion in the case at bar. The usefulness and relevancy of statistics depends on all of the surrounding facts and circumstances *Teamsters* v. *United States,* 52 L. Ed. 2d 396, 418 (1977). It is clear as a matter of law, that the statistics relied upon in the case at bar are irrelevant, and not sufficiently probative with respect to the Bachelor of

Science Degree requirement, or ASCP certification, in the field of scientific endeavor involving human health and life in a hospital.

Sixthly, the case at bar in all candor is not a Civil Rights case at all, although petitioner would have this Court view it as such. The case at bar in its proper prospective is simply a Civil Service case wherein no substantial Federal claim is involved. The Court is respectfully referred to respondents' brief, Point I thereof, and their reply brief in the Appellate Court below rather than a repetition of said argument.

At this point respondents are constrained to point to the attempt by petitioner to curry sympathy with this Court. At pp. 5, 6 of petitioner's brief, petitioner uses the word "fired" on three successive occasions. However, while petitioner was terminated in December 1973 because she failed to have the required college degree or ASCP certification, she was grandfathered in and did take the test in December 1971 and failed it, but was not terminated until December 1973. Additionally, petitioner was rehired by NCMC in March 1974, three months later, as laboratory technician II, albeit at a lower salary, and is employed to date by NCMC, whom she now accuses of discrimination.

Additionally, petitioner at page 7 of the petition for certiorari, footnote 7, refers to a memorandum dated August 8, 1977 from the Nassau County Civil Service Commission to Florence Turner, Personnel Officer of NCMC. Petitioner has gone outside the record on a memorandum not before the Court, nor in the record, and this should be frowned upon. However, contrary to petitioner's assertions, the said memorandum actually tightened the requirement by requiring only ASCP certification. ASCP certification requires a Bachelor of Science Degree plus laboratory training as well. The request was made by

John L. Duffy, M.D., Associate Chairman, Department of Pathology at NCMC, who was of the considered opinion that the Medical Technologist I should have training in most, if not all, areas of the laboratory. Consequently, the memorandum of August 8, 1977 can be construed only as a means of upgrading Medical Technologist I.

Petitioner's further attempt at page 13 of her brief to characterize her termination to be akin to a dismissal "because she had brown eyes or was born under the wrong sign of the Zodiac" flies in the face of reason and legal analysis and should be disregarded by this Court. Furthermore, as the Appellate Court correctly noted below, there was no violation of petitioner's rights under a "substantive due process" theory. *Townsend* v. *NCMC*, 558 F. 2d p. 121.

I

The Decision Below Is Clearly Correct

Respondents, in the Argument previously set forth, have amply demonstrated that general population statistics to establish a *prima facie* case of discrimination are not sufficiently relevant, when they do not relate to the employment practices of the respondents. The requirement of a college degree in the sciences is a neutral requirement protecting the public. The fields of scientific knowledge are too disparate, and cover too many disciplines, for the mere existence of a general college degree statistics in the general population, without more to sustain a presumption of racial discrimination. ***Townsend*** **v. *NCMC, et al.*, 558 F. 2d 117, 120 (2d Cir. 1977).**

Clearly, the position of medical technologist in a hospital involves specialized skills and is considered to be a "professional" position (A. 350, 407-422). One possessing the Civil Service title of medical technologist I is required to

be skillful in clinical chemistry, microbiology, blood-banking, serology and hematology in more than one laboratory, not just in the blood bank laboratory. The corresponding human risk factor for such a position is relatively high. For example, a mistake by a medical technician who is working in the blood bank laboratory can be the cause of a patient's disease or fatality (A. 58). Where a hospital job, such as medical technologist, involves a high human risk factor, the Equal Employment Opportunity Commission has determined that an employer's burden to prove that its qualification is job related is significantly less than where the job involves little or no human risk. 29 C.F.R. 1607.5(c)(2)(iii) states as follows:

> "(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high."

The Tenth Circuit in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (1972) has explained the employer's burden of persuasion of job-relatedness in cases such as the present as follows:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the

> economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." 475 F. 2d at 219.

See as well, *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 862 (7th Cir. 1974).

Analysis of the District Court's decision clearly and unmistakably reveals that Judge Weinstein of the District Court used the statistics introduced by petitioner as a vehicle to create a special position at NCMC for petitioner. This can be discerned by the conclusion reached by the District Court because while it found that the college degree requirement has a "discriminatory impact" on blacks, the District Court did not declare the job requirement at issue to be invalid or discriminatory as against any black person *except for this petitioner* (A. 304; Memorandum, p. 16). If "discriminatory impact", or "adverse racial effect" has any application at all, once such impact is found it must apply to all members of the adversely affected minority, and not only to one of those members to the exclusion of all others. The District Court was clearly erroneous in its memorandum decision in finding, on the one hand, that the educational requirement at issue has a "discriminatory impact" on blacks, yet on the other hand holding that the degree requirement is valid as to any black person seeking to be a medical technologist at NCMC except this petitioner. (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

The District Court was able to achieve this anomalous result by reliance upon a due process case decided by the

Washington, D.C. Circuit Court of Appeals.[1] In declaring the educational requirement at issue to be invalid only as to *this* petitioner, it is evident beyond cavil that the basis for this erroneous conclusion by the District Court is petitioner's satisfactory performance of her job in the blood bank laboratory, and not because of any job requirement that simultaneously has a discriminatory effect upon blacks, yet is not discriminatory against blacks.

It is respectfully submitted that doing a good job as a provisional employee within a municipal civil service system is not a ground for relief within the purview of Title VII, or any federal statute. Furthermore, if the educational requirement has a "discriminatory racial impact", then it must necessarily have an adverse discriminatory impact upon all blacks, and not solely upon petitioner who, it is conceded, does a good job in the blood bank laboratory.

Under all the facts and circumstances of this case, the Civil Service Law of the State of New York is the only applicable law, and the District Court abused its discretion and improperly applied TITLE VII to this case.

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[1] *Berger* v. *Board of Psychologist Examiners*, 521 F. 2d 1056 (1975). *Berger* is clearly inapplicable to a Title VII case. In *Berger*, plaintiff sought to have a local Washington, D.C. licensing statute declared unconstitutional as against the Due Process Clause of the Fifth Amendment. The D.C. Circuit Court of Appeals found this statute to be unconstitutional because, ***inter alia***, it denied current practitioners of psychology "grandfather rights" (i.e. permission to take the licensing examination) and because the Court found psychology to be an inexact science and a graduate degree, therefore, does not necessarily demonstrate competence. In the case at bar, ostensibly a Title VII case, the Nassau County Board of Supervisors passed a resolution (Resolution No. 1063-1968) which specifically accorded grandfather rights to petitioner and all other civil service employees similarly situated (A. 424). Furthermore, medical technology is an exact science and a bachelor of science degree is surely indicative of competence in this field. Finally, petitioner has no Due Process right to be reinstated as a provisional medical technologist I.

Reliance upon *Berger* v. *Board of Psychologist Examiners*, 521 F. 2d 1056 (D.C. Cir. 1975), that the educational requirement for medical technologist I, which the District Court simultaneously found has a "discriminatory impact" on blacks, but invalid only as to the petitioner, demonstrates beyond question that its decision was based upon petitioner's performance in the blood bank laboratory, and not upon any employment practice of respondents that has a discriminatory effect upon blacks. The facts and circumstances of this case do not justify this inconsistency, nor warrant intrusion by the federal courts pursuant to Title VII. Further abuse of the District Court's discretion was committed by unwarranted encroachment upon local sovereignty when it ordered that appellee be reinstated as a medical technologist I. *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L. Ed. 2d 245 (1976); *Bishop* v. *Wood*, 426 U.S. 341, 48 L. Ed. 2d 684, 693 (1976).

Petitioner, by reason of her provisional status, has no cognizable federal right to be retained as a medical technologist I. The fact that she has or has not been performing her job creditably is of no consequence and proffers no federal right to relief upon petitioner. *Russell* v. *Hodges*, 470 F. 2d 212 (2d Cir. 1972); *Gallagher* v. *Codd*, 407 Fed. Supp. 956 (S.D.N.Y. 1976); *Haroon* v. *Board of Education of City of New York*, 411 Fed. Supp. 61 (E.D.N.Y. 1976).

New York law gives the power to determine qualifications of applicants for promotional examination to the local Civil Service Commissions. Civil Service Law §20, subd. 1 and §52, subd. 2 (McKinney's Consol. Laws of New York Anno.); *Matter of Wirzberger* v. *Watson*, 305 N.Y. 507 (1953). It is equally clear, under New York law, that a provisional employee, such as petitioner, has no vested rights or tenure in her position. *Koso* v. *Greene*, 260 N.Y. 491 (1933). No facts were presented by petitioner that

would be sufficient to remove the instant proceeding from the application of the foregoing principles of New York law.[2]

It is respectfully submitted that this Court follow the general principle enunciated by it in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, 429 (2d Cir. 1975):

> "It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators."

While it is clear that federal courts are empowered to examine and pierce state laws in the framework of federal civil rights enactments, the case at bar does not present such a factual situation that justifies or warrants such a confrontation. It is respectfully submitted that the Court should defer to the classification for medical technologist I established by respondent Civil Service Commission.

By its strained and erroneous interpretation in applying Title VII to the case at bar, the District Court has, in effect, created reverse discrimination within the NCMC. In *Milson* v. *Leonard*, —— Fed. Supp. ——, E.D.N.Y.

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[2] The original impression of the District Court, i.e. that this case presented only a "bureaucratic" problem, is the correct impression of the case at bar. The District Court noted:

> "But, my problem is not whether individuals are crushed by the machinery or bureaucracy, because that happens all the time. That is not what the court is here for, to rectify every injustice. There must be an injustice as to whites as well as blacks in that hospital. My problem is whether you have made out a case based on race." (A. 182).

See, as well the dialogue between the District Court and Mr. Allen Scimeca, at A. 154-155.

Docket No. 74 C 904 (1975, Dooling, J.), (App. 1A) plaintiff, a white female, brought suit against the Nassau County Civil Service Commission (hereinafter "Commission") to be reinstated provisionally, as a medical technologist III at NCMC, and to be accorded an opportunity to take the April 1973 examination for permanent status in that position. (Slip Op., at pp. 1-2). The Commission excluded plaintiff from the April 1973 examination on the ground that she lacked the educational requirements for the position (Slip Op., at p. 3). The court, in *Milson, id.*, dismissed plaintiff's complaint pursuant to Fed. R. Civ. P. 56, finding that plaintiff did not and could not present a claim for relief that is cognizable by a federal court. The court, in *Milson, id.*, also noted that "questions of jurisdiction are troublesome." (Slip Op., at p. 5).

The decision of the District Court left NCMC and the Commission in a position where a white woman who, like petitioner, was a provisional employee, and who, like petitioner, was performing competently in her provisional position, yet who, unlike petitioner, has no right to be reinstated in her provisional position with full back pay. The decision of the District Court constitutes nothing more than reverse discrimination and should be reversed. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 US 273, 49 L. Ed. 2d 493 (1976); *Kirkland* v. *New York State Board of Correctional Services, supra.* This is particularly true in the case at bar, where the effect of the decision of the District Court will not be diffused among an unidentifiable group of persons, but will and does affect a small number of readily identifiable persons. *Equal Employment Opportunity Commission* v. *Local 638*, 532 F. 2d 821, 828 (2d Cir. 1976).

Respondent is also compelled to note that the District Court wholly failed to reconsider its original decision in

light of *Washington* v. *Davis,* 426 U.S. 229, 48 L. Ed. 2d 597 (1976) as instructed by the United States Court of Appeals, 2d Circuit (R. 19a, 20a) *Townsend* v. *Nassau County Medical Center, et al.,* 538 F. 2d 314 (2d Cir. 1976). The Court is respectfully referred to Point III of respondents' brief in the Appellate Court below for a full discussion of this issue.

In sum, it is clear that petitioner failed to prove a *prima facie* case of racial discrimination and the complaint was properly dismissed.

II

There Is No Conflict of Decision

Petitioner alleges at pp. 8, 9 of her brief that *Townsend* v. *Nassau County Medical Center, et al.,* 558 F.2d 117 (2d Cir. 1977) with respect to the *prima facie* case is contrary to *Dothard* v. *Rawlinson,* cited *supra,* and the Appellate Court below's decision conflicts with the decisions of three other circuits. Petitioner also contends that as a practical matter, the Appellate Court below could not have been aware of *Dothard* v. *Rawlinson,* cited *supra,* because it was decided just three days prior to the decision in the case at bar.

At the outset, it should be noted that petitioner submitted a petition for rehearing in *Townsend* on or about July 14, 1977 to the United States Court of Appeals for the Second Circuit. The petition for rehearing was denied on August 24, 1977 (35a, 36a), over a month later. The touchstone of petitioner's rehearing motion was precisely *Dothard* v. *Rawlinson.* It may fairly be presumed that the United States Court of Appeals thoroughly reviewed all aspects of *Dothard* and found no merit whatsoever to petitioner's

Dothard contention since the petition was denied without the Court requesting an opposing brief from respondents, (Rule 40, Federal Rules of Appellate Procedure).

Petitioner's proffered argument that the Second Circuit's holding in *Townsend* v. *Nassau County Medical Center, supra,* conflicts with three other circuits is groundless.

In *Townsend* v. *Nassau County Medical Center, supra,* the Court stated:

> "Neither *Griggs, supra,* nor *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F. 2d 1361 (5th Cir. 1974), or *United States* v. *Georgia Power Co.,* 474 F. 2d 906 (5th Cir. 1973), relied upon by appellee, support the proposition that statistical evidence concerning only the general population is sufficient to demonstrate that a job prerequisite 'operates to exclude' minorities. In all of these cases plaintiffs established that virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant.
>
> If we were to hold that a bare census statistic concerning the number of blacks in the *general population* who have college degrees could establish a *prima facie* case of discrimination, every employer with a college degree requirement would have the burden of justifying the degree requirement as job-related. See *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The burden of showing job-relatedness cast upon the employer does not arise until the discriminatory *effect* has been shown. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, at 137 n. 14, 97 S. Ct. 401, 408-09, 450 L. Ed. 2d 343 (1976). 'This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination.' *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405,

425, 95 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975). We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption against a college degree requirement." (558 F. 2d p. 120)

The Court is respectfully referred to footnote 6 at 558 F. 2d p. 120 for a further detailed commentary by the United States Court of Appeals for the Second Circuit.

In retrospect, the Appellate Court below's analysis squarely meets petitioner's arguments broached in her petition (pp. 9, 10).

Finally, petitioner relies on *Dothard* v. *Rawlinson,* cited *supra,* for sustaining her position that she sustained her *prima facie* case. Respondents reiterate each and every argument submitted to this Court contained in the Argument previously stated. Respondents also point out that the very language quoted by petitioner (petitioner's brief pp. 8, 9) does not offer any succor or sustenance for her *prima facie* argument.

In *Dothard* v. *Rawlinson, supra,* this Court stated:

"There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." (53 L. Ed. 2d p. 798).

This court did not mandate that an analysis of the characteristics of actual applicants is barred. On the contrary such analysis may be relevant depending upon the facts and circumstances of a particular case. For this reason, respondents' arguments contained in Point II of their brief in the Appellate Court below is most appropriate and ap-

plicable under the factual pattern in the case at bar. Furthermore, petitioner's statistics do not reflect those college graduates having Bachelor of Science degrees.

The Appellate Court below stated:

"There were no statistics for the B.S. degree in particular." (558 F. 2d p. 120)

Therefore, petitioner's proffered statistics fall short in terms of germaneness and relevancy. In *Dothard* v. *Rawlinson,* cited *supra,* this court, by virtue of the "moreover" statement (53 L. Ed. 2d p. 798) that reliance on general population demographic data was not misplaced does not work adversely to respondents. Simply stated in the case at bar, we are dealing with a medical technologist I who is required to be competent in different scientific laboratories of a hospital, and there is reason and justification for a high level of expertise and competency. It is clear that petitioner's evidence on its face fails to demonstrate conspicuously a job requirement's grossly discriminatory impact.

III

There Is No Substantial Question Affecting the Enforcement of a Pervasive Federal Law

Respondents contend that under all the facts and circumstances in the case at bar, petitioner has failed to raise a cognizable claim within the ambit of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) Respondents also argue that the District Court erred in its analysis of the applicability of Title VII to the facts of this case. The District Court's unwarranted intrusion into a situation that presented itself as nothing more than the internal administration of a local civil service matter justified a

reversal and dismissal of the complaint by the United States Court of Appeals for the Second Circuit.

As the United States Court of Appeals, Second Circuit, correctly and unanimously noted in *Townsend* v. NCMC, 558 F. 2d 117:

> "We feel constrained to say that, on these facts, were the District Court judgment to stand, this hard case would make bad law .... In any event, should a college degree requirement ever be interposed as a prerequisite simply as a pretext for disqualifying members of the black community, the courts will be alert to deal with violations of Title VII. But we cannot say that this is such a case." (558 F. 2d p. 122).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 30, 1977

NATALE C. TEDONE
Senior Deputy County Attorney

WILLIAM S. NORDEN
Deputy County Attorney

Of Counsel

APPENDIX

Memorandum and Order for Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 904

JEAN MILSON,

Plaintiff,

—against—

ADELE LEONARD, as Executive Director of the Nassau County Civil Service Commission, and the NASSAU COUNTY CIVIL SERVICE COMMISSION,

Defendants.

Appearances:

JAMES N. GALLAGHER, Esq. (JOHN F. O'SHAUGHNESSY, Esq., County Attorney, of Counsel), *for defendants*

ALLEN R. MORGANSTERN, Esq. (RICHARD HARTMAN, Esq., of Counsel), *for plaintiff*

DOOLING, D.J.

Plaintiff sues to be reinstated, provisionally, in the job of medical technologist III at Meadowbrook Hospital until she is accorded a chance to take the civil service examination necessary to attain recognized permanency in that position. She has been since May 1974 (as of January 1, 1974) a medical technologist II at the Meadowbrook Hospital; she has recognized permanency in that position by virtue of her having passed the April 1973 examination

for the position. Plaintiff's complaint is that she was wrongfully denied admission to the April 1973 examination for medical technician III, and so was denied a fair chance to gain permanency in her provisional employment as a medical technician III, a position she had held on a provisional basis from July 7, 1967 until the end of 1973. At that time, she had to yield the provisional position to an appointee who had passed the April 1973 test. The difference in annual salary between the two positions is nearly $5,500.

The controversy grows out of a reclassification of jobs in July 1967. Plaintiff was then working as a "senior microbiologist." County records show that she had not been awarded permanent but only provisional status in that job. She did, however, have permanency as a microbiologist. When the jobs were reclassified, a microbiologist became a "medical technician I" and a senior microbiologist became a "medical technician II." A "principal microbiologist" became a "medical technician III." Although plaintiff had never held the position of senior microbiologist with permanency, she nevertheless jumped to a provisional medical technician III on July 7, 1967, a job two promotion steps above the new titular position to which her permanent status as a "microbiologist" entitled her.

Pursuant to a special resolution of the County Supervisors plaintiff was permitted, as an actual "incumbent" of a medical technician III position to take the 1969 test for medical technician III without satisfying the training and experience requirements established for that position. She took and failed the test. She was, through error, allowed to take the next test for the III job in December, 1971, and again she failed to pass the test. During all this time she continued in the job as a provisional III.

Plaintiff was, however, excluded from the next III test given on April 1973, on the ground that she did not meet the educational or training requirements for medical technician III. She also could not qualify to take the examination as a person in direct line of promotion because she only had permanency as a medical technician I, *two* grades below medical technician III. She did, however, take and pass the test for medical technician II, given in April 1973, and she now has permanency in that job classification. Plaintiff's present permanent position as II entitles her to take the next examination for medical technician III, however no examination is in immediate prospect.

Plaintiff asserts that her 1967 reclassification was in error, but her roster card refutes her assertions of fact, and bears out the County's contentions. It appears, moreover, that plaintiff was notified under date of July 7, 1967, that her then present title was medical technician III, that she had permanent status appropriate for medical technician I, and that to retain the III title she would have to take an examination.

On the facts, then, no ground of complaint appears. Plaintiff does not make out a case of deprivation of right because she is, simply, wrong in her assertion that she was entitled to take the April 1973.

Plaintiff does not bring hereself within 42 U.S.C. 1320a-2. The section, added to Title 42, by Public Law 92-603 of October 30, 1972, requires the Secretary to establish a program "to determine the proficiency" of *academically* unqualified persons to perform the duties and functions of laboratory technicians, the program to include the employment of procedures for formal testing of proficiency of such persons. The statute provides that no person may be denied a rating for which he or she has actual pro-

ficiency solely because of the person's failure to meet formal educational or professional requirements. The program is related and, evidently, limited to 42 U.S.C. 1395-1395 pp —— subchapter (or "Title") XVIII, dealing with Health Insurance for the Aged and Disabled. And, quite apart from that, the testing procedures here involved do not evince the characteristics which the Secretary is authorized, in effect, to eliminate as conditions upon proficiency determination.

The questions of jurisdiction are troublesome, under 42 U.S.C. 1983 as under 28 U.S.C. 1331, but it can at least be said with some assurance that the Court may entertain the case as one for injunctive relief against the defendant Leonard under 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343.

Defendants' motion, first made under Rule 12, has become a motion under Rule 56, and, since there is no genuine issue of fact, defendants are entitled to summary judgment.

It is, accordingly,

ORDERED that defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment that plaintiff take nothing and that the action is dismissed on the merits without costs.

Brooklyn, New York
September 17, 1975.

/s/ JOHN F. DOOLING, JR.
U. S. D. J.

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-718

MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1977

No. 77-718

Margaret Townsend,

Petitioner,

—against—

Nassau County Medical Center, *et al.*,

Respondents.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Certiorari is sought in this case on the ground that the Second Circuit held that unrebutted census data is insufficient to establish a prima facie case of discriminatory impact under Title VII, a holding squarely contrary to the rule in three other circuits and to *Dothard* v. *Rawlinson*, 97 S.Ct. 2720 (June 27, 1977). Respondents do not dispute our characterization of the decision below or of *Dothard*, and do not discuss the decisions of the Fifth, Eighth and Ninth Circuits. Respondents suggest instead a number of alternative arguments in support of the decision below; each of these arguments has already been rejected by prior decisions of this Court.

Frankly conceding that "petitioner performs her work in the blood bank laboratory in a competent manner,"[1] re-

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[1] Brief for Respondents in Opposition to Petition for a Writ of Certiorari (hereinafter "Brief in Opposition"), p. 4.

spondents urge that her dismissal for lack of a college degree was nonetheless proper because such a degree requirement is necessary to choose among *new* applicants. Regardless of whether the degree requirement could be validated for such new applicants under *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and its progeny none of those cases sanction the use of a job requirement to dismiss or reject an employee or applicant who is in fact qualified. On the contrary, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 426, 436 (1975) makes clear that even a job-related requirement cannot be used if there is another method of selecting qualified personnel "without a similarly undesirable racial effect." In this case, of course, just such an alternative to the college degree requirement exists for determining whether petitioner is competent to do the job at issue—her decade of exemplary performance at that very job.

Respondents' argument that the human risks involved justify the challenged requirement is misdirected. Respondents do not argue that petitioner herself poses any risks to her patients but in fact concede that she has more than satisfactorily performed all duties required of her since 1965, and that she continues to perform satisfactorily the duties of a Medical Technologist I, albeit at a lower salary.[2] Imposition of formal indicia of competence in no way serves to protect the public from increased risks. Its only effect is to lower petitioner's status and salary, a result wholly inconsistent with one of the purposes of Title VII, *i.e.*:

[2] Brief in Opposition, p. 4.

> . . . that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 806 (1973).

Respondents contend for the first time in this case that petitioner's statistical showing regarding the numbers of black and white college graduates was inadequate because there was no evidence regarding the race of persons holding Bachelor of Science degrees. In *Dothard* this Court expressly rejected a similar suggestion:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made. 97 S.Ct. at 2727.

So far as we have been able to establish, no data exist as to the numbers of blacks and whites with Bachelor of Science degrees. Moreover, while a distinction based on a graduate's actual course of study may be appropriate for certain jobs, a distinction based on whether the graduate's degree is titled "Bachelor of Science" is palpably irrational in view of the fact that some schools, such as Harvard and Wellesley, give a Bachelor of Arts degree to biology and chemistry majors, while others, as the Massachusetts Institute of Technology, give a Bachelor of Science degree to English and humanities majors.

Respondents also urge that a job requirement cannot be unlawful under Title VII if some whites[3] too cannot meet the requirement. But in *Griggs* the high school requirement was one that could not be met by 66% of the whites, and in *Dothard* the height and weight requirements could not be met by 3% of adult males. Moreover, nothing in Title VII requires an employer to continue to apply to white or male applicants job requirements which cannot be applied to blacks or women, and the order of the district court in this case forbidding application of the degree requirement to petitioner left respondents free to cease using that requirement in other instances.

Respectfully submitted,

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[3] Respondents assert here, as in the court below, that three whites were also fired for want of a college degree. Brief in Opposition, pp. 4-5. The Second Circuit accepted this assertion, p. 26a. The record contains no evidence that whites were in fact dismissed, as Mrs. Townsend was. However, even if that fact were true, it is statistically insignificant and may only be demonstrative of respondents' overwhelmingly white workforce.

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